Supreme Court, U.S.
FILED
MAR 6 2003
OFFICE OF THE CLERK

No. 02-1157

In The

Supreme Court of the United States

PAUL ENRIGHT,

Petitioner,

v.

SOLAR TURBINES INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. EMER*
JAMES D. DEROCHE
PERKINS COIE LLP
1620 26th Street
Sixth Floor, South Tower
Santa Monica, CA 90404-4013
(310) 788-3300
Counsel for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court wishes to grant a petition for writ of certiorari in the instance of a factual finding by the district court that Petitioner had failed to meet his burden of proof, that a sufficient number of jobs were foreclosed from him, to meet the criteria under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

2. Whether this Court wishes to consider whether the district court properly excluded a declaration of an expert witness proferred by Petitioner based on a finding that the opinions expressed therein lacked the proper foundation.

3. Whether this Court wishes to consider whether the district court should have admitted into evidence an arbitrator's decision, along with its findings and conclusions.

LIST OF PARTIES

All parties appear in the caption. S. Ct. 24.1(b).

CORPORATE DISCLOSURE

The parent corporation of Solar Turbines Incorporated is Caterpillar, Inc. and is a wholly owned subsidiary of Caterpillar, Inc.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
PRELIMINARY STATEMENT	1
COUNTERSTATEMENT OF THE CASE	1
A. Cloaked In The Guise Of Championing The EEOC Interpretative Guidelines, The Petition Does Little More Than Quibble With The District Court's Assessment Of The Merits Of Petitioner's Case	2
B. The Admissibility Of Expert Testimony Is Discretionary With The District Court And Reviewed Under The Abuse Of Discretion Standard	4
C. Contrary To The Petition's Assertions, The Arbitrator Had The Authority To Make Findings And Conclusions Regarding Petitioner's Disability And The District Court Had The Authority To Consider It, But What Weight It Carried Is Unclear	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) 7, 8

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 238 (1993) 5, 6

General Electric Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) 5

Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 42 L. Ed. 2d 129 (1974) 5

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) 5

Roback v. V.I.P. Transp. Inc., 90 F.3d 1207 (7th Cir. 1996) 5

Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999) 5

Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, *clarified*, 292 F.3d 1045 (9th Cir. 2002) 3, 5

United States v. Bowers, 534 F.2d 186 (9th Cir.), *cert. denied*, 429 U.S. 942, 97 S. Ct. 360, 50 L. Ed. 2d 311 (1976) 5

United States v. Systems Architects, Inc., 757 F.2d 373 (1st Cir.), *cert. denied*, 474 U.S. 847, 106 S.Ct 139, 88 L. Ed. 2d 115 (1985) 5

STATUTES

42 U.S.C. § 2000e, et seq 7

Americans with Disabilities Act, 42 U.S.C. § 12101 i

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12102 3

29 C.F.R. § 1630.2(j)(3)(i) 3, 8

Federal Rules of Evidence, Rule 702 ..... 2, 4, 5, 6

Supreme Court Rule 10 ..... 1, 3

Supreme Court Rule 24.1(b) ii

PRELIMINARY STATEMENT

This Court exercises its discretion to grant a petition for writ of certiorari only when motivated by "compelling reasons." S. Ct. Rule 10. This Petition for Writ of Certiorari attempts to elevate a prosaic Ninth Circuit opinion that is of no interest to anyone except the parties involved. It does not unsettle or create any conflict of law, it does not ignore the supremacy of federal jurisprudence and it does not serve as citable precedent for parties outside the confines of the dispute. Rather, and despite Petitioner's efforts to cloak the lower courts' decisions as precedential, this dispute is largely based on Petitioner's failure to adduce material, relevant, and admissible evidence at the district court level to support his claims. At best, and placed within the rubric of S. Ct. Rule 10, the Petition merely asserts erroneous factual findings and the contended misapplication of a properly stated rule of law. The Ninth Circuit's unpublished, two-page opinion did little more than uphold the ruling of the district court. Contrary to Petitioner's assertion, it is not in conflict with other Circuits, nor is there anything noteworthy.

COUNTERSTATEMENT OF THE CASE

The first question Petitioner presents is whether the EEOC's Interpretative Guidelines, as set forth in the Code of Federal Regulations, regarding the definition of disability under the Americans with Disabilities Act was followed and properly applied. Petitioner asserts that it was not, but the record does not support this. Contrary to Petitioner's assertions, the district court expressly considered the EEOC's Interpretative Guidelines, but determined

that Petitioner had failed to adduce admissible evidence to meet his prima facie case.

The second question Petitioner presents is whether the district court, under Rule 702 of the Federal Rules of Evidence, properly excluded certain expert testimony in support of Petitioner's claims. According to the record, the trial excluded the expert's proffered testimony, for, among other reasons, the lack of a proper foundation. Admissibility of expert testimony is well within the discretion of the district court and generally not something that concerns this Court. Going further, however, the district court found that the expert's opinion *in toto* did not carry Petitioner's burden of proof.

The third and final question Petitioner presents is whether the district court should have considered an arbitrator's "decision" and whether the arbitrator exceeded his authority. Here, Petitioner overstates the importance of the role of the arbitrator at the district court level. The district court admitted into evidence the findings and conclusions of the arbitrator, but the record does not reflect how much weight it was accorded. Regardless of the arbitrator's decision, the district court concluded *on its own* that Petitioner simply had failed in his burden of proof.

A. Cloaked In The Guise Of Championing The EEOC Interpretative Guidelines, The Petition Does Little More Than Quibble With The District Court's Assessment Of The Merits Of Petitioner's Case.

Petitioner would have this Court view his case as a vehicle to resolve an open question surrounding what

constitutes a "disability" under the Americans with Disabilities Act, 42 U.S.C. § 12102 et seq., based on the guidelines put forth by the EEOC. This case is not the proper vehicle for that determination. The Ninth Circuit, for example, seemingly accepts the EEOC's regulatory guidelines (see *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, *clarified,* 292 F.3d 1045 (9th Cir. 2002)), and the district court operated under the same assumption. (Pet. 11a-12a) Indeed, citing 29 C.F.R. § 1630.2(j)(3)(i), the district court's approach echoed the very EEOC guidelines which Petitioner now asks this Court to impose. (Pet. 16-17 and 12a) Boiled down to its essence, Petitioner merely disagrees with the district court's resolution of the evidence presented, and its admissibility, and asks this Court to make a contrary determination. That is not this Court's function. S. Ct. 10.

Petitioner concedes that under the ADA an impairment must "substantially limit" an individual's ability to work. (Pet. 20) Finding, as the district court must, that the scope and breadth of the impairment span many jobs and not just one, and while acknowledging, without rejection, the same Petitioner assertions made here (Pet. 11a-12a), the district court examined the evidence adduced by Petitioner and found it lacking. Specifically, the district court found the Petitioner had failed to establish that his impairment was "substantially limiting," a requirement under the regulations. 29 C.F.R. § 1630.2(j)(3)(i).

For example, the district court found Dr. Hoagland's letter too "conclusory" to support a claim of "substantial limitations." (Pet. 12a) The district court found Dr. Dalessio's letter inconclusive (Pet. 12a-13a) and Dr. Kilburn's testimony as not sufficiently probative on the issue of the scope and breadth of the asserted disability. (Pet. 13a)

Discussed below, the district court also found that Mr. Remas' opinion was not sufficiently probative and lacked a proper foundation. (Pet. 13a-14a) And, finally, the district court found that the determination from the State of California Department of Rehabilitation was not sufficiently clear and did not adequately address the issue under federal law to be determinative.

In short, the district court found that Petitioner had failed to meet the essential elements of his prima facie case that a wide scope of jobs were unavailable to him, elements that Petitioner seems to concede were applicable. For that reason, instead of presenting this Court with an instance where proper interpretation of the ADA is warranted, Petitioner merely argues that the district court should have weighed the evidence differently.

B. The Admissibility Of Expert Testimony Is Discretionary With The District Court And Reviewed Under The Abuse Of Discretion Standard.

From the outset, Petitioner misstates the nature of the district court's ruling concerning the vocational rehabilitation expert. (Pet. 21-24) The district court ruled that the expert, Mr. Remas, lacked the appropriate foundation upon which to base his opinion under Fed. R. Evid. 702, and failed to properly and to completely address the scope of the effect of Petitioner's disability. (Pet. 13a-14a) The Ninth Circuit upheld the district court's ruling on the admissibility of evidence. (Pet. 4a) Whether the inadmissibility of Mr. Remas' declaration affected the district court's decision – if at all – is unclear but it is clear that the district court felt the Petitioner's adduced evidence, and Mr. Remas' declaration, fell woefully short of the mark.

The admissibility of evidence is well within the sound discretion of the district court. *Hamling v. United States,* 418 U.S. 87, 127, 94 S. Ct. 2887, 2912, 42 L. Ed. 2d 129 (1974); *United States v. Bowers,* 534 F.2d 186, 193, n.7 (9th Cir.), *cert. denied,* 429 U.S. 942, 97 S. Ct. 360, 50 L. Ed. 2d 311 (1976); *United States v. Systems Architects, Inc.,* 757 F.2d 373, 377 (1st Cir.), *cert. denied,* 474 U.S. 847, 106 S.Ct 139, 88 L. Ed. 2d 115 (1985); *Roback v. V.I.P. Transp. Inc.,* 90 F.3d 1207, 1215 (7th Cir. 1996). The discretion accorded the district courts is particularly germane here since the determination of whether a person is disabled under ADA is an individualized inquiry. *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 483, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999); *Thornton v. McClatchy Newspapers, Inc., supra,* 261 F.3d at 794.

This Court has already addressed this issue now in three separate opinions. They are: *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 238 (1993). The landmark case of *Daubert*, provides the analytical framework for determining the admissibility of expert testimony under Rule 702. Within that standard, the district court acts as a "gatekeeper" to exclude expert testimony that is irrelevant or does not result from the application of reliable methodologies or theories to the facts of the case. *Id.* at 589-92. In *Daubert*, this Court set forth a non-exclusive list of factors that district courts may use in evaluating expert testimony. *Id.* at 593-94. When presented with the issue again in *Kumho Tire Co.*, this Court emphasized that the *Daubert* inquiry is "a flexible one" and that the analysis will depend on the

nature of the issue, the witness's expertise, and the subject of the testimony. This Court also explained that the principles of *Daubert* applied not only to scientific testimony, but to all expert testimony. *Id.* at 149.

In keeping with that, in 2000, Congress amended Fed. R. Evid. 702 so that it now provides that an expert witness with "scientific, technical, or other specialized knowledge" may testify in the form of an opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702 advisory committee's notes. As amended, Rule 702 does not distinguish between scientific and other forms of expert testimony.

Based on the foregoing, there is nothing about the district court's ruling on the admissibility of the Remas' declaration that merits this Court's attention.

C. Contrary To The Petition's Assertions, The Arbitrator Had The Authority To Make Findings And Conclusions Regarding Petitioner's Disability And The District Court Had The Authority To Consider It, But What Weight It Carried Is Unclear.

Here, too, Petitioner overstates his case. The district court addresses the arbitrator's findings and conclusions in one paragraph finding that Petitioner's due process was fully satisfied after "a full and fair hearing." (Pet. 10a) Finding that the arbitrator's decision contained a "thorough factual and legal analysis," the district court admitted it into evidence. *Id.*

Petitioner asserts two claims, to wit, that the arbitrator was not impartial and went beyond the scope of his authority.

The purported bias stems solely from the arbitrator's selection by Respondent and the Petitioner's union. (Pet. 24) There is no record, however, that Petitioner did not participate in the selection process. Suggesting just the opposite conclusion, it is clear from the record that the arbitration was formed out of the collective bargaining process between Respondent and Petitioner's union and that he was adequately represented by the union at the time of the arbitration hearing. (Pet. 20a) There is no record that the arbitrator acted with bias. Indeed, the district court found just the opposite. (Pet. 10a)

In addition, there is no record that if the arbitrator exceeded the scope of the submission, the district court considered it. (Pet. 10a) The arbitrator made a specific finding that under the collective bargaining agreement, disability was an issue expressly falling with the arbitrator's jurisdiction. The case cited by Petitioner, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), is inapposite. Therein, Justice Powell writing for the Court held that an employee subject to a collective bargaining agreement, that includes an arbitration provision, does not waive thereby access to the courts to seek redress for a statutory violation.[1] In so holding, this Court further noted that "[i]f an arbitral decision is based *'solely* upon the arbitrator's view of the

[1] In *Alexander*, the violation involved Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." [Emphasis added.] *Id.* at 53, 1022. That did not occur here. The arbitrator made it clear there was a nexus between the contractual issues and the statutory provisions on disability/discrimination. (Pet. 21a) It is for this reason that the arbitrator ruled on the question of disability. *Alexander* does not preclude this.

In addition, and suggesting strongly that the district court did not rely exclusively on the arbitrator's decision, the ruling by the arbitrator is distinctly different in scope than the district court's. The arbitrator focused exclusively on the scope of available work at Solar and whether Solar discriminated against him by not accommodating him with another position. (Pet. 25a-30a) The district court, on the other hand, focused on whether Petitioner's medical sensitivity to fumes amounted to a physical impairment that restricted him from a "class of jobs." (Pet. 11a-12a) The district court considered the issue *de novo*, and, quite differently from the arbitrator, ruled that Petitioner had failed to meet his burden of proof that he was unable to perform a "class of jobs or a broad range of jobs in various classes." 42 C.F.R. § 1630.2(j)(3)(i). (Pet. 34a)

CONCLUSION

The two-page unpublished opinion of the Ninth Circuit correctly upheld the district court. No factors should motivate this Court to exercise discretion to address this case which poses no legal conflict or important public policy issues. This matter simply fails to present the

sort of substantial legal question(s) deserving of review by the highest court in the land. With an arbitration, lawsuit in the district court, appeal to the Ninth Circuit Court of Appeals, the parties and judicial system already have invested far more resources examining the extent of Petitioner's alleged physical condition than should have been incurred. This petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM H. EMER
Counsel of Record

JAMES D. DEROCHE

PERKINS COIE LLP

Attorneys for Respondent
Solar Turbines Incorporated